CLJ_2013_9_397

LIM CHOK

v.

LIM CHIK LOCK

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL RAHMAN SEBLI J
[CIVIL SUIT NO: 22NCVC-81-03-2012]
2 MAY 2013

COMPANY LAW: *Charges - Land - Facilities charged on land belonging to another company - Default of repayment - Commencement of proceedings to charge land - Settlement of debts by guarantor - Claim for 50% debt settled from co-guarantor - Whether money used to settle debts was guarantor's own money or company's money - Lim Eow Thoon v. Lim Fang Tee & Ors*

The plaintiff and the defendant, father and son, respectively, were both shareholders and directors of Mascotwood Sdn Bhd ('Mascotwood') and had obtained facilities from RHB Bank Bhd ('RHB Bank'). The facilities were secured by a charge on a piece of land ('the land') belonging to another family company known as Lim Chok Realty Sdn Bhd ('Lim Chok Realty') and by personal guarantees by both the plaintiff and the defendant. When there were law suits pertaining to the affairs of the family companies, the plaintiff and the defendant, along with other family members, entered into a consent order to settle their disputes. According to the terms of the consent order, Mascotwood was to be put into voluntary liquidation and was not to make any payment out of its account. However, Mascotwood began to default in its repayment to RHB Bank, prompting the latter to commence proceedings against Lim Chok Realty as chargor, to auction the land. To prevent the auction, the plaintiff paid RM703,240.92 to RHB Bank to settle Mascotwood's debts ('the debts'). The primary issue that arose for the court's determination was whether it was the plaintiff's money or Lim Chok Realty's money that was used to settle the debts. The plaintiff alleged that the amount of RM703,240.92 was his own money and in the present claim sought an order that the defendant pays him 50% of the said amount, which was RM351,620.46. The plaintiff cited the principle in *Lim Eow Thoon v. Lim Fang Tee & Ors* and argued that it was not important whose money it was that was used to settle the debts but what was important was who had physically settled the debts.

Held (dismissing claim):

(1) A letter written by the solicitors for Lim Chok Realty and addressed to RHB Bank was crucial as it informed Lim Chok Realty's wish to discharge the charge as soon as possible. About a week later, the plaintiff as a signatory to Lim Chok Realty's bank account, uplifted six fixed deposits from the company's account and made transfers of RM116,681.40 each into his personal account. The only reasonable inference that could be drawn was that the RM703,240.92 which the plaintiff used to pay the debts belonged to Lim Chok Realty and not his own personal money. Therefore, the question of contribution by the defendant did not arise at all as the obligation would only arise if the plaintiff had used his own money to settle the debts. Lim Chok Realty, being a private limited company had a legal entity of its own separate and distinct from its shareholders and directors. The plaintiff could not claim personal ownership over any money in the company's account. (paras 6 & 7)

(2) The *ratio decidendi* of *Lim Eow Thoon v. Lim Fang Tee & Ors* had no relevance to the issue in the present action, which was whether the defendant was liable for contribution. The substratum of the plaintiff's argument was structurally faulty. It ignored the simple truth that the RM703,240.92 came from Lim Chok's Realty and not from the plaintiff's own pocket. It also ignored the fact that the plaintiff had control and dominion over Lim Chok's Realty funds. What the plaintiff did, if at all, was merely to make payment on behalf of the debts by utilising Lim Chok Realty's funds. The fact that the money was paid out from his personal account did not alter the fact that the money belonged to Lim Chok Realty. It would be wrong for the plaintiff to treat the RM703,240.92 as his own money simply because it was money deposited into his personal account. (para 10)

Case(s) referred to:
Lim Eow Thoon v. Lim Fang Tee & Ors [1958] 3 MC 164 ***(dist)***
Wong Kim Swee v. Wong Chee Mun & Ors [1984] 1 LNS 2 HC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 99

For the plaintiff - Pang Kong Seng (WC Teo with him); M/s KS Pang & Co
For the defendant - Gan Techiong; M/s Gan & Lim

Reported by Najib Tamby

JUDGMENT

Abdul Rahman Sebli J:

[1] The plaintiff and the defendant are father and son respectively. Both are shareholders in several family companies. One of the companies, namely Mascotwood Sdn Bhd ('Mascotwood') in which the plaintiff and the defendant are directors had obtained banking facilities from RHB Bank Berhad ('RHB Bank'). The facilities were secured by a charge of a piece of land at Wakaf Tapai, Terengganu belonging to another family company, Lim Chok Realty Sdn Bhd ('Lim Chok Realty') and by personal guarantees signed by both father and son. By cl. 41 of the charge Lim Chok Realty was the principal debtor and the land the principal security for the monies due under the charge. As at January 2011, there were several lawsuits pending between the plaintiff, the defendant and their other family members concerning the affairs of the family companies. On 28 January 2011 the disputing family members entered into a consent order to settle all their disputes once and for all. According to the terms of the consent order Mascotwood was to be put into voluntary liquidation and was not to make any payment out of its account.

[2] After the consent order was recorded and pending the voluntary liquidation, Mascotwood started to default in its repayment to RHB Bank and RHB Bank then commenced proceedings against Lim Chok Realty as chargor to auction the land at Wakaf Tapai. To prevent the auction the plaintiff paid RM703,240.92 to RHB Bank to settle the whole of Mascotwood's debts. The plaintiff is alleging that the RM703,240.92 that he used to settle the debts was his own money. What he is now claiming is for contribution by the defendant. He is asking for an order that his son do pay him 50% of the RM703,240.92, which works out to RM351,620.46. The defendant son denies liability to pay the RM351,620.46 as according to him it had been agreed

that Mascotwood's debts were to be paid using the funds of Lim Chok Realty and that as a matter of fact it was the funds of Lim Chok Realty that had been used to settle Mascotwood's debts with RHB Bank and not the plaintiff's own money.

[3] Section 99 of the Contracts Act 1950 ('the Contracts Act') provides as follows:

> Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or that part of it which remains unpaid by the principal debtor.

[4] In *Wong Kim Swee v. Wong Chee Mun & Ors* [1984] 1 LNS 2; [1984] 2 MLJ 221 the High Court in dealing with this provision held that if any co-surety had paid the creditors towards the discharge of the debt and obtained a discharge, then the others were equally liable to contribute to the sum paid towards that discharge. By virtue of this provision it was contended that the defendant as co-guarantor is liable to contribute towards the settlement of Mascotwood's debts by the plaintiff.

[5] The issue to be determined is whether it was the plaintiff's money or Lim Chok Realty's money that was used to settle Mascotwood's debts by payment of the RM703,240.92. If it was Lim Chok Realty's money that was utilised to settle the debts, then the plaintiff has no basis to personally claim for contribution from the defendant. In this regard the letter dated 22 September 2011 written by Messrs Yeo Tan Hoon & Tee who acted as solicitors for Lim Chok Realty and addressed to RHB Bank is crucial. The material parts of the letter read as follows:

> Our client Lim Chok Realty would like to discharge the charge herein as soon as possible. As per your letter dated 15.9.2011, the amount required for the discharge on or before 30.9.2011 is RM705,668.69.
>
> As our client will now be resolving this matter expeditiously, our client requests that in the spirit of goodwill, your client will be able to grant a discount on the interest, as well as on the costs in relation to this Originating Summons and Civil Suit No.22-20-2011 in the Kuala Terengganu High Court.

[6] The purpose of the letter is clear. It was to inform RHB Bank that Lim Chok Realty (as opposed to the plaintiff personally as co-guarantor) wished to discharge the charge as soon as possible. About a week later, ie, on 29 September 2011 the plaintiff in his capacity as signatory to the bank account of Lim Chok Realty at the Taman Sentosa branch of Public Bank Berhad ('Public Bank Taman Sentosa') uplifted six fixed deposits from the company's account and made transfers of RM116,681.40 each into his personal account at the Johor Bahru branch of the same bank. At the trial the plaintiff admitted that Lim Chok Realty's fund was controlled by him and that the company had more than RM1 million in its fixed deposit account at Public Bank Taman Sentosa. He further admitted that he did not have any fixed deposit account with that branch of the bank. The evidence shows that he only had RM923.91 in his personal account.

[7] On the facts the only reasonable inference that can be drawn is that the RM703,240.92 that the plaintiff used to pay Mascotwood's debts belonged to Lim Chok Realty and not his own personal money. Therefore the question of contribution by the defendant does not arise at all. The obligation to contribute only arises if the plaintiff as co-guarantor had used his own money to settle the debts. Lim Chok Realty, being a private limited company has a legal entity of its own separate and distinct from its shareholders and directors. The plaintiff cannot claim personal ownership over any money in the company's account. In cross-examination the plaintiff was evasive when questioned on the six transfers of RM116,681.40 each that he made into his own personal account. At first he was adamant that he had no recollection if the money was transferred from the company's account. It was only after he was confronted with irrefutable proof that the monies came from the fixed deposit account of Lim Chok Realty at Public Bank Taman Sentosa that he grudgingly admitted that the monies had indeed come from the company's fixed deposit account at Public Bank Taman Sentosa. On such a material issue as this, one would expect the plaintiff to be forthright in his answers. The fact that he was not shows that he had something to hide. Having regard to the sum involved and the purpose of the transfer it is improbable that he had no memory of where the money had came from. It is not the kind of transaction that one could easily forget, particularly when it

happened less than two years ago. This attempt by the plaintiff to hide the truth undermines his credibility as a witness. I reject his evidence that the RM703,240.92 that he paid to RHB Bank to settle Mascotwood's debts came from his own pocket. I am satisfied that the money came from Lim Chok Realty's account at Public Bank Taman Sentosa and which he transferred to his personal account.

[8] The plaintiff's argument plain and simple is that it is not important whose money it was that was used to settle Mascotwood's debts. What is important according to the plaintiff is who physically settled the debts. In other words it does not matter who owned the RM703,240.92. All that matters is who effected payment. The following observations made by Thompson CJ in *Lim Eow Thoon v. Lim Fang Tee & Ors* [1958] 3 MC 164 at p. 171 were cited in support of the proposition:

> I knew of no authority nor has counsel for the applicant been able to show us any that would justify the Court in having regard to the source from which the money came or to the subsequent behaviour of the assets of which it was the product. In fact these particular assets appreciated in value. But the money might have been the product of other assets, as for example Japanese bonds, which might have fallen in value. That to my mind is entirely beside the point. What the applicant advanced was money and what he is entitled to have back is money and interest on it.

[9] With due respect to counsel he had completely taken the above passage out of context. The context in which Thompson CJ made the observations was in relation to the following peculiar facts. The applicant in administering the estate of the deceased during the Japanese occupation sold land of his own for $140,000 in order to pay off the funeral expenses, estate and other encumbrances on the lands comprising the estate. He applied for reimbursement of the sum which he had expended out of his own pocket. The trial judge allowed a sum of $4,516 only. The applicant appealed against the order, arguing that the price of land, then and at the time of his appeal and the income that it would have produced if not sold, should all be taken into account. The Court of Appeal, in dismissing the applicant's appeal held that the applicant was only entitled to $4,516 as that was the equivalent of $140,000 in Japanese occupation currency.

[10] Clearly the *ratio decidendi* of the case has no relevance to the issue before the court in the present action, which is whether the defendant is liable for contribution. The substratum of the plaintiff's argument is structurally faulty. It ignores the simple truth that the RM703,240.92 came from Lim Chok Realty's pocket so to speak and not from the plaintiff's own pocket. It also ignores the fact that the plaintiff had control and dominion over Lim Chok Realty's funds at Public Bank Taman Sentosa. What the plaintiff did if at all was merely to make payment on behalf of Lim Chok Realty towards settlement of Mascotwood's debts by utilising Lim Chok Realty's funds. The fact that the money was paid out from his personal account does not alter the fact that the money belonged to Lim Chok Realty. It would be wrong for the plaintiff to treat the RM703,240.92 as his own money simply because it was money deposited in his personal account. In all probability and it is my finding that the purpose of the transfer to his personal account was to provide sufficient fund to settle Mascotwood's debts by using Lim Chok Realty's funds. Personally the plaintiff was in no financial position to settle Mascotwood's debts of close to RM1 million with the meagre RM923.91 that he had in his personal account as at 28 September 2011. Thus for all intents and purposes it was Lim Chok Realty and not the plaintiff or the defendant who settled Mascotwood's debts. Indeed this was Lim Chok Realty's expressed intention as reflected in Messrs Yeo Tan Hoon & Tee's letter dated 22 September 2011.

[11] By payment of the RM703,240.92, Lim Chok Realty as the principal debtor had fully settled Mascotwood's debts. There is therefore no part of the debts which remains unpaid by the principal debtor in respect of which the defendant is under an obligation to contribute to the plaintiff within the meaning of s. 99 of the Contracts Act. In the circumstances and for reasons aforesaid the plaintiff's claim was dismissed with costs.